



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 73 of 2010

ARTHUR MITSUNE CLAIMANT

-VERSUS-

DODWELL AND COMPANY (EA) LTD.....1ST RESPONDENT

INCHCAPE SHIPPING SERVICES LIMITED.....2ND RESPONDENT

RULING

On 4th February 2013 during the examination in chief of the Respondents witness No.1 One **ROSE NDUKU MAINGI**, the Claimants Advocate Mr. Oyatsi raised objection to the examination in chief of the witness on whether or not the Claimants medical cover had a cover limit. His reasons for raising the objection was that the Claimant was never cross-examined on the cover limit of his AAR Medical Cover. He contends that this being the case, the evidence of the Claimant to the effect that his medical cover was comprehensive and that there was no limit on the cover stands unchallenged and the Respondent cannot adduce any evidence to controvert this evidence.

He further submitted that the Respondent is bound by its pleading wherein there was no mention of the limit to the medical cover. Mr. Oyatsi further submitted that the Respondent had opportunity to apply for amendment of the Respondents Memorandum of Reply to include the defense that the medical cover had a cover limit which they did not do. He submitted that in the absence of a pleading that there was a cover limit the witness cannot give evidence to prove what is not in the pleadings, that this is against the law.

Mr. Oyatsi further submitted that the purpose of cross examination of a witness is threefold; to discredit the witness's evidence, to challenge the character of the witness and to put to the witness the case of the party, that having failed to put to the Claimants witness its case, the Claimant would suffer injustice as the Court would only consider the Respondent's evidence that is not backed by pleadings or by cross examination of the Claimant. The Claimant also filed written submissions which is substantially on similar arguments.

Mr. Khagram in response stated that the cross examination was covered by his colleague. He submitted that the fact that the issue was covered in re-examination must mean that it was covered in cross-examination. He further submitted that Paragraph 13 of the defense clearly covers the limitation of the cover especially sub-paragraph (a) and (b). He further submitted that it is the law of evidence that the Plaintiff alleges and it is for him to prove the limit, that the defense cannot be stopped from adducing evidence to rebut the allegation, that the evidence is not backed by any proof, that the easiest thing was for the Claimant to provide the cover which he has not. The Plaintiff must therefore carry the

consequence of failure to submit the evidence. He further submitted that the defense is not obliged to prove their defense, that the defense is only considered once the Plaintiff has proved its case.

The Claimants Counsel filed the following authorities:-

- 1.Halsbury's Laws of England, 3rd Edition, VoL.15, Paragraph 801.
2. Evidence in East Africa by H.F. Morris Page 205.
3. Triloknath Bhandari & another Vs S.R. Gautama, (1964) E.A. Page 606.

I have considered the submissions by both parties and the Claimants written submissions with the attached authorities. I have also looked at the record of the cross examination of the Claimant and find that indeed the Claimant was cross examined on the cover limit. I reproduce herein below an extract of the record containing the cross examination and re-examination of the Claimant.

25/11/2011

Judge - Hon. Justice Mukunya

C/Clerk - Kenneth

PARTIES

Oyatsi for Claimant

Ms. Nyaito holding brief for Khagra for Respondent

RE: FURTHER HEARING
CLAIMANT

ARTHUR PAUL MUTSUNE

STILL ON OATH

CROSS-EXAMINATION BY MS. NYAITHO

I took a car loan of about Shs.600,000/=. I was repaying on monthly installments until I was terminated. I do not remember how much I repaid. I was repaying over Shs.30,000/= a month. I had paid 9 (nine) months. There is still an outstanding amount of about Shs.400,000/=.

I was given a Comprehensive Medical Cover for myself, spouse and children below 18 years. It is my understanding that the medical cover was comprehensive. I had medical expenses of about Shs.1Million at Nairobi Hospital. I purportedly paid Shs.300,000/=. The company paid for me and later purported that I had asked for a loan. I had not asked for any loan. I was made to sign a letter by the company before I could be discharged. Letter is at Page 15 of Claimants bundle. I signed the matter that I would repay the amount of Shs.347,407/=. I do not know the amount I was covered in the medical scheme.

Nobody complained of my performance of my duties. I came to know of complaint by Ms. Claire Odimwah – Appendix A of reply after this dispute. I was wrongfully terminated. The reason given was re-structuring. The reason put in my termination letter was my performance. I was not told of this reason before termination.

Since termination I have been working for Seashore Shipping Service on commission basis from December 2009. I was not working with Seashore before termination.

I was not given an opportunity to explain my defense against the allegations made against me. My fundamental rights were breached. The termination was evil, unfair and wrongful. I am seeking reinstatement. I have not repaid the car loan in full.

RE-EXAMINED BY OYATSI

I have not repaid the car loan because I am unemployed. There is no limit to the medical cover.

Oyatsi – close of Claimants case.

I have looked at the Authorities filed by the Claimant. I do not see in any of them the position that where a Plaintiff is not cross-examined on any issue, that issue cannot be brought up in the examination in chief of the Defendant's witnesses. The authorities only confirm, as correctly put in Paragraph 4 of the Claimant's submissions on the objection, that failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or whole of his evidence. The authorities do not state that the other party may not call a witness to controvert what another witness was not cross-examined on. The use of the word "may" also shows that this is not a strict rule of evidence and that there may be situations when it does not apply.

Since the main ground of the objection was that the Claimant was not cross examined on the cover limit which the record has shown was not the case, the objection is overruled.

Orders accordingly.

Read in open Court and signed on this 2nd day of March, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

Mr. Oenga h/b for Oyatsi

In the Presence of: _____ for Claimant

Mr. Ongicho h/b for Khagram

_____ for Respondent